

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 23-1978:

FRAZER EDUCATION ASSOCIATION  
AFFILIATED WITH THE MONTANA  
EDUCATION ASSOCIATION,

Complainant,

FINAL ORDER

- vs -

VALLEY COUNTY SCHOOL DISTRICT  
2 AND 2B,

Defendant.

\*\*\*\*\*

No exceptions having been filed, pursuant to ARM 24.26.107,  
to the Findings of Fact, Conclusions of Law and Recommended Order  
issued on February 28, 1979:

THEREFORE, this Board adopts that Recommended Order in this  
matter as its FINAL ORDER.

BOARD OF PERSONNEL APPEALS

By: *Robert Cromley*  
Robert Cromley  
Chairman

DATED this 10<sup>th</sup> day of April, 1979.

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CERTIFICATE OF MAILING

I, Jennifer Jacobson, do hereby certify and state that I did  
on the 11<sup>th</sup> day of April, 1979, mail a true and correct copy of  
the above FINAL ORDER to the following persons:

Dr. Richard E. Cunningham  
Superintendent  
Frazer Public Schools  
Box 488  
Frazer, MT 59225

Emilie Loring  
Hilley & Loring  
1713 Tenth Avenue South  
Great Falls, MT 59405

Peter O. Maltese  
Attorney at Law  
110 Fifth Avenue South  
Glasgow, MT 59230

Tom Gigsted  
Box 1382  
Glendive, MT 59330

*Jennifer Jacobson*  
Jennifer Jacobson

BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR  
PRACTICE NO. 23-78:

FRAZER EDUCATION ASSOCIATION  
AFFILIATED WITH THE MONTANA  
EDUCATION ASSOCIATION,

Complainant,

vs.

VALLEY COUNTY SCHOOL DISTRICT  
2 AND 2B,

Defendant.

FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND  
RECOMMENDED ORDER

\*\*\*\*\*

Complainant, in above captioned matter, filed an Unfair Labor charge with the Board on September 7, 1978. The charge alleged that the Defendant violated Sections 39-31-401(1) and (5) MCA, of the Collective Bargaining Act for Public Employees by failing to bargain collectively in good faith with the Complainant in that they demanded teachers to sign individual contracts. The Complainant contended this constitutes individual bargaining, is coercive in nature, and is an attempt to deny teachers their rights under Section 39-31-201 MCA.

On September 13, 1978, Mr. Richard Cunningham, Superintendent, Frazer Public Schools, was served with the Unfair Labor Practice charge.

The Board received reply from the Defendant on September 25, 1978. The Defendant stated that individual contracts were issued, however, Defendant denied all charges as specified.

A formal hearing in this matter was conducted on October 25, 1978, in the Teacher's Lounge, Frazer High School, Frazer, Montana, before Stan Gerke, Hearing Examiner. The hearing was conducted under authority of Section 39-31-406 MCA, and as provided for by the Montana Administrative Procedure Act (Title 2, Chapter 4 MCA).

1 The Frazer Education Association, Affiliated with the Montana  
2 Education Association was represented by Mr. Emilio Loring of the  
3 law firm of Hilley and Loring, Great Falls, Montana. Valley  
4 County School District 2 and 28 was represented by Peter O.  
5 Maltese, Attorney at Law, Glasgow, Montana.

6 MOTIONS

7 Complainant made motion to strike certain portions of  
8 Defendants Answer to Unfair Labor Practice charge for reason they  
9 were completely irrelevant to the matter. The portions are as  
10 follows:

- 11 [1] ... and the Association refused to represent its  
12 members. The members never vote on any Association  
13 propositions and therefore, the president of the  
14 Association represents himself, only, most of the  
15 time.  
16 [2] The school board and the association are at impasse  
17 on these items of the new proposed contracts.  
18 a. Agency shop  
19 b. Administrative approval of sick leave (prior  
20 notice) and  
21 c. Administrative approval of association leave.  
22 All other items in the proposed contract have been  
23 settled or initialed off.

24 I rule that the first portion be struck from the record. I  
25 find the language irrelevant to the matter and highly inflammatory.  
26 On the second portion, I rule to include the language in the  
27 record. The statements may have been used as a defense by  
28 Defendant.

29 After a thorough review of the record, including the testimony  
30 of witnesses, the demeanor of witnesses, the exhibits and post-  
31 hearing briefs, I make the following:

32 FINDINGS OF FACT

1. The Frazer Education Association (FEA) is the exclusive  
bargaining representative for teachers employed by the Valley  
County School District No. 2 and 28 (District).

2. The collective bargaining agreement between the FEA and  
the District for school year 1977-78 contained language for re-  
opening the agreement for negotiating a succeeding agreement

1 for the 1978-79 school year. By letter of January 4, 1978, Tom  
2 Gigstad, President and Chief Negotiator for the FEA, notified  
3 the District of the FEA's intention of re-opening the 1977-78  
4 agreement for that purpose.

5 3. Ten bargaining sessions were held between the parties  
6 in February, March, April and May of 1978. No agreement resulted  
7 from these sessions.

8 4. The FEA unilaterally requested mediation assistance  
9 from the Board of Personnel Appeals and mediation sessions were  
10 conducted on June 1 and 2, 1978. The parties agree that mediation  
11 helped greatly to reduce the differences at the bargaining table,  
12 however, final settlement of all issues was not achieved.

13 5. On June 21 and 22, 1978, Mr. Gigstad and Mr. Peter D.  
14 Maltese, negotiations spokesman for the District, met in  
15 bargaining sessions and came to a tentative agreement pending  
16 clarification of a "couple of items." However, no formal agree-  
17 ment was signed at this time.

18 6. Mr. Gigstad received notice on July 26, 1978, from  
19 District Superintendent, R.E. Cunningham, that the District was  
20 withdrawing its base salary offer of \$10,000 per year that was  
21 contained in the tentative agreement and substituting a base of  
22 \$9,600. According to Mr. Cunningham and Mr. Don Whitmas, Chairman,  
23 District School Board and member of District's Bargaining Team,  
24 the reduction was necessary because of school levy failure.

25 7. On August 8, 1978, the parties met again in bargaining  
26 session. The FEA proposed to accept the lower \$9,600 base salary  
27 figure in return for concessions by the District on representation  
28 fee (agency shop) and leave policy. The District conceded on the  
29 leave policy but no agreement was reached on the representation  
30 fee. Counsel for the District endeavored to gather testimony to  
31 the fact that the District had reached its "final position" on  
32 the matter. The District's representatives may have discussed

1 and determined that their position was finalized, however, the  
2 FEA's representatives were not informed of that fact, according  
3 to the testimony of Mr. Gigstad and Mr. Cunningham.

4 8. On October 4, 1978, the parties again met in bargaining  
5 session. No agreement was reached and a mutual request for  
6 fact-finding was made to the Board. It was pointed out that the  
7 parties were in the fact-finding process at the time of this  
8 formal hearing.

9 9. Mr. Gigstad testified that all teachers were issued a  
10 "letter of intent" (Complainant's Exhibit #10) in the middle of  
11 March, 1978, and were given 20 days in which to respond. This  
12 testimony was confirmed by Mable Pyle, first-grade teacher. This  
13 procedure was in keeping as in years before according to Mr.  
14 Gigstad. This testimony was not contradicted during the hearing.

15 10. Mr. Gigstad testified that the "letter of intent" was a  
16 subject of discussion during a bargaining session held on April  
17 19, 1978. According to Mr. Gigstad, the FEA informed the District  
18 that a "letter of intent" was the proper method to handle the  
19 hiring of teachers until a new agreement was reached and that the  
20 FEA would oppose the issuance of "individual contracts". Mr.  
21 Cunningham, while admitting he didn't possess a "super memory",  
22 testified he didn't recall the discussion of the "individual  
23 contracts", however, he did not deny that the discussion took  
24 place. Furthermore, Mr. Gigstad's recollection of the subject  
25 was detailed and without hesitance. Therefore, I find the dis-  
26 cussion of "individual contracts" was held at the April 19, 1978,  
27 bargaining session.

28 11. Mr. Gigstad testified that teachers received "individual  
29 contracts" on August 31, 1978, at the end of the school day.  
30 (Defendant's Exhibit #1). Mr. Cunningham confirmed the fact that  
31 the contracts were issued to all returning teachers. In addition,  
32 Mr. Cunningham explained that new teachers received "individual

1 contracts" in May, June or July, 1978.

2 12. Mr. Gigstad and Ms. Pyle both testified they were told  
3 verbally that if they would sign the "individual contracts" and  
4 return them the following day (September 1, 1978) they would  
5 receive their salary. According to Mr. Cunningham, four teachers  
6 (including Mr. Gigstad and Ms. Pyle) did not sign their "indi-  
7 vidual contracts" and these four did not receive their salary.  
8 Mr. Cunningham explained that three of the four signed their  
9 contracts by the middle of September, 1978, and were paid. Ms.  
10 Pyle testified that she signed her contract on September 14, 1978,  
11 and then received her salary on the same day. Mr. Gigstad re-  
12 ceived his salary on September 19, 1978, by authorization of Mr.  
13 Cunningham. However, Mr. Gigstad did, at the close of school on  
14 the same day, sign his contract.

15 13. Mr. Gigstad received a letter from Mr. Cunningham  
16 relative to the "individual contract" dated September 14, 1978,  
17 which states (Complainant's Exhibit #7):

18 Dear Mr. Gigstad;

19 Teaching contracts were offered you, dated September 1,  
20 1978, to teach this year for Fraxer Schools.

21 You have had 20 days in which to sign your contract. The 20  
22 days extend to September 20, 1978.

23 If you have not signed your contract by that time, the  
24 district will assume you are not interested in employment  
25 for this year and your job will be terminated.

26 Sincerely,

27 R. E. Cunningham  
28 Superintendent

29 Mrs. Tom Gigstad, also a teacher, testified that the letter also  
30 pertained to her because of the wording in the first paragraph.  
31 Mr. Cunningham explained, "... it's standard that if you issue a  
32 contract you have twenty days in which to sign it and if you  
don't sign it after twenty days you vacate your position."

DISCUSSION

Counsel for the Defendant argues, in his post-hearing brief, that the Defendant and the Complainant were at impasse in contract negotiations and, therefore, it was proper for the Defendant (employer) to unilaterally implement his last offer (via individual contracts) to the employees so long as he does not go beyond his last offer (NLRB v. Katz, 369 US 736). A true "impasse" situation may have existed in the minds of the District's bargaining team members, however, as discussed in Finding of Fact #7, no testimony was presented to conclude the parties were in true "impasse". In addition, the "individual contracts" were issued on August 31, 1978 (see Findings of Fact #11); the last bargaining session between the parties was held October 4, 1978, (see Findings of Fact #8), more than a month after the issuance of the contracts. Further, the parties had requested Fact Finding on or about October 4, 1978; and were in the process of implementing Fact Finding at time of the formal hearing (see Finding of Fact #8). Defendant's Counsel's argument that the parties were at impasse is not documented by the record. Conversely, the record does indicate the parties were in a continuing state of bargaining up to the time of the formal hearing.

Defendant also argues that issuance of the "individual contracts" was merely a bookkeeping device and that the "individual contracts" were contingent upon any collective bargaining agreement between the parties. Mr. Cunningham gave considerable testimony concerning the methods by which the District paid salaries to the teachers. According to Mr. Cunningham, in past years teachers received their salaries one month in advance. This advance payment method was discussed during contract negotiations and Mr. Cunningham explains:

The association [FEA] had agreed to switching under the new contract to payment at the end of services, also, we got into trouble with the Title I office in Helena because they told us that Federal Law prohibits payment

1 in advance of services and, of course, we had three  
2 Title I teachers that are all last year paid a month in  
3 advance except for this year, so the association [FEA]  
4 had agreed to switch to payment at the end of the  
5 month so ...

6 Mr. Cunningham further pointed that it was "bad business  
7 practices and everything else" not to have some sort of contract  
8 to pay wages.

9 Testimony revealed that the traditional monthly advance wage  
10 payment made on the first of each month was changed by the  
11 District for school year 1978-79. Mr. Cunningham explained that  
12 for September, 1978, only, teachers received a \$300 cash advance  
13 on September 1; the balance of wages owed the teachers for the  
14 month of September was paid on the last working day in September.  
15 Thereafter, teachers would receive their monthly salary for any  
16 particular month on the last working day of that month.

17 Counsel for the Defendant argues that section numbers 5 and  
18 6 of the "individual contract" (Defendant's Exhibit #1) which  
19 states,

20 "(5) Both parties shall comply with the provisions of  
21 the applicable State laws, terms and conditions of the  
22 collective bargaining agreement and with the adopted  
23 policies of the Board of Trustees (a copy of which has  
24 been received by the teacher) which are made a part of  
25 this contract by reference."

26 "(6) The individual contract is subject to the terms  
27 and conditions of the collective bargaining agreement  
28 between the Association and the Board of Trustees, and  
29 to the extent that the provisions of this contract and  
30 said agreement may be inconsistent, the provisions of  
31 said agreement shall be controlling.

32 clearly subjugates the terms of the "individual contract" to the  
33 terms agreed to by the FEA and the District in a master contract.

34 These two arguments appear to be rather insignificant upon  
35 examination of this Board's final order in ULP 17-1975 (Board of  
36 Trustees of Billings School District No. 2 v. State of Montana  
37 ex rel Board of Personnel Appeals and Billings Education  
38 Association, Cause No. 70652, District Court of the Thirteenth  
39 Judicial District of the State of Montana in and for the County



1 of Yellowstone) which states:

2 In fact, it becomes obvious that the function of  
3 the individual contract has been relegated to nothing  
4 more than a document stating the intention of the  
5 teachers to teach in the public school system for the  
6 academic year. Any interpretation giving the individual  
7 contract any more efficacy would be in conflict with  
8 the teachers' right to collectively bargain and would  
9 therefore be repugnant to Section 59-1603 [39-31-201  
10 MCA], which gives the teachers the right to collectively  
11 bargain. It was never intended by the legislature,  
12 that the individual contract was to be substituted for  
13 the master contract. So they must be kept totally  
14 separate. The master contract deals with wages, hours,  
15 and other conditions of employment; the individual  
16 contract deals only with the individual teacher's  
17 intent to return to the district and teach for the  
18 upcoming year.

19 In reference to Findings of Fact #9, the teachers were  
20 issued "letters of intent" in the Spring of 1978. The content of  
21 these letters (Complainant's Exhibit #10) was to confirm the  
22 individual teacher's intent to return the following year or not.  
23 The "individual contracts" issued by Mr. Cunningham on August 31,  
24 1978, (See Findings of Fact #11 and Defendant's Exhibit #1),  
25 however, surpassed the limits of a proper "teachers' individual  
26 contract" by incorporating wages and hours - two elements  
27 strictly reserved for collective bargaining.

28 To bargain individually with members of a bargaining unit is  
29 an unfair labor practice as discussed in federal case law,  
30 Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944) 14 LRRM  
31 501:

32 That it is a violation of the essential principle  
of collective bargaining and an infringement of the Act  
for the employer to disregard the bargaining repre-  
sentative by negotiating with individual employees,  
whether a majority or a minority, with respect to  
wages, hours and working conditions was recognized by  
this Court in J. I. Case Co. v. Labor Board, No. 67  
1943 Term [14 LRR Man. 501]...

The J.I. Case Co. case, *supra*, discusses individual contracts  
relative to individual bargaining:

Individual contracts, no matter what the circumstances  
that justify their execution or what their terms may  
not be availed of to defeat or delay the procedures  
prescribed by the National Labor Relations Act looking  
to collective bargaining, nor to exclude the contracting

1 employee from a duly ascertained bargaining unit; nor  
2 may they be used to forestall bargaining or to limit or  
3 condition the terms of the collective agreement. "The  
4 Board asserts a public right vested in it as a public  
5 body, charged in the public interest with the duty of  
6 preventing unfair labor practices." National Licorice  
7 Co. v. National Labor Relations Board, 309 U.S. 350,  
8 364 [6 LRR Man. 674]. Wherever private contracts  
9 conflict with its functions, they obviously must yield  
10 or the Act would be reduced to a futility.

11 In reference to Findings of Fact Nos. 11, 12 and 13, the  
12 Defendant amplified the individual bargaining by threatening to  
13 withhold wages and, by letter (reference Complainant's Exhibit  
14 #7) threatened to terminate employees for failing to sign individual  
15 contracts.

#### 16 CONCLUSIONS OF LAW

17 Defendant, Valley County School District 2 and 2B, has  
18 engaged in an unfair labor practice within the meanings of Sections  
19 39-31-401(1) and (5) MCA by bargaining individually with members  
20 of an existing bargaining unit and by that action, failed to  
21 bargain collectively, in good faith, with the exclusive bargaining  
22 representative, Fraser Education Association affiliated with the  
23 Montana Education Association.

#### 24 RECOMMENDED ORDER

25 It is hereby ordered that Valley County School District No.  
26 2 and 2B shall:

- 27 1. Cease and desist from failing to bargain in good faith  
28 with the Fraser Education Association, affiliated with  
29 the Montana Education Association.
- 30 2. Take appropriate action to make null and void all  
31 existing individual contracts issued to individual  
32 teachers which impair the teachers' right to bargain  
collectively.
3. Post these FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
RECOMMENDED ORDER in the usual posting area(s) in a  
conspicuous manner for a period of not less than thirty  
(30) days.

NOTE

Pursuant to Rule ARM 24.26.584, either party in this matter may, within twenty (20) days of issuance of the above Findings of Fact, Conclusions of Law and Recommended Order, file exceptions to the same with the Board of Personnel Appeals.

DATED this 28<sup>th</sup> day of February, 1979.

BOARD OF PERSONNEL APPEALS

BY

Stan Gerke  
Stan Gerke  
Hearing Examiner

CERTIFICATE OF MAILING

I, Janice Jacobsen, do hereby certify and state that on the 28<sup>th</sup> day of February, 1979, I mailed a true and correct copy of the above FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER to the following:

Dr. Richard E. Cunningham  
Superintendent  
Frazer Public Schools  
Box 488  
Frazer, MT 59225

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116 Fifth Avenue South  
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